RECORD AND BRIEFS

No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants below, are the District of Columbia and two of its police officers, Andre Parker and Anthony Campanale. Petitioners had been named as defendants in the district court along with Edwin Espinosa, Jason Newman, and Faraz Khan.

Respondents, who were the appellees below, are Theodore Wesby, Alissa Cole, Anthony Maurice Hood, Brittany C. Stribling, Clarence Baldwin, Antoinette Colbert (as personal representative of the Estate of Ethelbert Louis), Gary Gordon, James Davis, Joseph Mayfield, Jr., Juan C. Willis, Lynn Warwick Taylor, Natasha Chittams, Owen Gayle, Shanjah Hunt, Sidney A. Banks, Jr., and Stanley Richardson.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 765 F.3d 13. The order denying rehearing en banc with concurring and dissenting statements (Pet. App. 102a-139a) is reported at 816 F.3d 96. The memorandum opinion of the district court partially granting respondents' motion for summary judgment on liability (Pet. App. 45a-99a) is reported at 841 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The court of appeals denied a timely petition for rehearing en banc on February 8, 2016. On April 13, 2016, the Chief Justice extended the time for filing a petition for certiorari to June 8, 2016. The petition was filed that day and granted on January 19, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents brought this action under 42 U.S.C. § 1983 and District of Columbia common law, claiming that their arrests for criminal trespass were without probable cause.

The Fourth Amendment provides, in relevant part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . .

The District of Columbia's criminal trespass statute provided at the relevant time:

> Any person who, without lawful authority, shall enter or attempt to enter, any public or private dwelling, building or other property, . . . against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor . . . . The presence of a person in any private dwelling, building, or other property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign, shall be prima facie evidence that any person found in such property has entered against the will of the person in legal possession of the property.

D.C. Code § 22-3302 (2008).

STATEMENT OF THE CASE

A. Factual Background.

As late Saturday night became early Sunday morning on March 16, 2008, respondents and an unknown number of others were partying in a home that did not belong to any of them, without the absent owner's permission. (Pet. App. 47a-48a; J.A. 99, 112.) The essential facts of what the police learned in those early morning hours are undisputed.

Concerned neighbors alerted the District of Columbia Metropolitan Police Department about the party,

reporting that the house was supposed to be vacant, and had been vacant for several months. (J.A. 94, 112, 131.) They also reported "illegal activities" at the party. (J.A. 98-99, 112.)

Uniformed officers arrived at the home around 1:30 a.m. (J.A. 112, 189.) Through a first-floor window, they saw one of the partiers inside run upstairs at the sight of their approach. (J.A. 112.) When the officers knocked and entered through the front door, others also scattered into different rooms. (J.A. 143.) After searching the home, petitioners Andre Parker and Anthony Campanale and other officers found 21 persons inside, including a man hiding in a closet. (Pet. App. 47a-48a; J.A. 177.) Another stayed in a bathroom after officers "bang[ed]" on the door, until they pushed it open. (J.A. 50.)

Gathering the partiers, the officers observed evidence of activity like that "conducted in strip clubs for profit." (J.A. 112.) Several women had been conducting "lap dances" and were "dressed only in their bra and thong with money hanging out [of] their garter belts." (J.A. 112, 154; C.A. App. 75-83 (photographs).) Someone told Officer Campanale that a woman had been "selling sex" upstairs, where police found some men and a naked woman. (J.A. 50, 73-74, 115-18, 122-23.) Police also found open and used condoms on the scene. (J.A. 112; C.A. App. 87.) In addition, officers smelled marijuana in the home. (J.A. 97-98, 131, 165.)

Consistent with its "being a vacant property," the house was in "disarray" and essentially unfurnished. (J.A. 97, 112.) It had just a mattress on the floor upstairs and some folding chairs. (Pet. App. 4a; J.A. 96-97.) Although the electricity (and perhaps the plumbing) had not been disconnected, the house was

dark during the party, with candles lit beside the mattress. (Pet. App. 4a; J.A. 52, 71-72, 96, 114.)[1]

A supervisor, Sergeant Andre Suber, and several other officers on the scene gathered information and interviewed all persons present. (J.A. 52-53.) When officers asked for information about the homeowner, the partiers had no answer. (J.A. 52-53, 67, 90.)[2] Several eventually said that they had been invited by other people, and some said that a woman whose real name they did not know—identified as "Peaches" (or sometimes "Tasty")—had been there previously and had given them permission to be in the home. (Pet. App. 48a n.4; J.A. 53, 97-98, 131-32, 135.) "Peaches" was not present when police arrived. (J.A. 53, 97-98.)

Officers took the time to further investigate. They called "Peaches" on the phone several times but she was "evasive" and repeatedly hung up. (J.A. 53-54.) She refused to come to the scene, explaining that she would be arrested if she did so. (J.A. 165.) "Peaches" asserted that she had told the partiers they could use the home. (J.A. 53.) She also initially claimed to police that the owner had given her permission to use the home and that she was "possibly" renting it from him. (J.A. 53-54.) Soon, though, "Peaches" admitted to police that, contrary to her initial claim, she lacked the owner's permission to use the home. (J.A. 54.)

Police also spoke with the homeowner, a Mr. Hughes, who confirmed that no one, including "Peaches,"

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[1] The court of appeals perceived "inconsistencies" in the record regarding the exact state of the furnishings and other minor factual issues that are not material. (Pet. App. 4a & n.1.)

[2] The opinions below indicated that some partiers told police that they were there for a bachelor party, while others said it was a birthday party, and that, either way, no one identified the guest of honor. (Pet. App. 4a, 10a, 119a; *see* J.A. 35, 193 ¶ 28.)

had permission to be there. (J.A. 99-100.) Mr. Hughes stated that he and "Peaches" had tried, but failed, to reach a lease agreement. (J.A. 99.)

Based on all of this information, Sergeant Suber directed that the partiers be arrested for trespassing. (J.A. 55.) He had previously kept his watch commander, who was not on scene, informed of the situation, and she approved of his decision to arrest. (J.A. 57-58.) At summary judgment, Officer Parker did not recall placing anyone under arrest, while Officer Campanale did not recall the identity of anyone he arrested. (J.A. 75-77, 101, 139.)

After the arrestees were transported to the police station, the watch commander on the next shift decided that they should be charged instead with disorderly conduct, even though Sergeant Suber physically "provided him with the D.C. code of the unlawful entry statute." (J.A. 55-56, 63.) Prosecutors later decided not to pursue charges. (Pet. App. 120a.)

B. District Court Proceedings.

Respondents—16 of the 21 individuals arrested—brought suit in the United States District Court for the District of Columbia. (Pet. App. 46a.) They asserted Fourth Amendment claims under 42 U.S.C. § 1983 and tort claims under District of Columbia common law, all based on the alleged lack of probable cause for their arrests. (Pet. App. 46a, 63a.) They sued, among other defendants, the two petitioner officers, Parker and Campanale, and the petitioner District of Columbia, but not Sergeant Suber. (Pet. App. 46a.)

After discovery closed, both petitioners and respondents moved for summary judgment. (Pet. App. 47a.) Respondents did not submit any statement from "Peaches," or even any information about her identity.

The district court granted respondents summary judgment on liability on their false arrest claims against Parker and Campanale and related common-law claims against the District. (Pet. App. 100a-101a.) It held as a matter of law that the officers lacked probable cause to arrest for trespassing because "nothing about what the police learned at the scene suggests that [respondents] 'knew or should have known that they were entering against the owner's will.'" (Pet. App. 64a (alterations omitted).) Based on this view, the court denied the officers qualified immunity. (Pet. App. 74a.) The court further held that, whether or not they actually made any arrests, Parker and Campanale were liable as a matter of law for all of the arrests simply by being "actively involved in the matter at some juncture." (Pet. App. 83a.)

After a damages-only trial, the court entered a $680,000 judgment against Officers Parker and Campanale, and jointly against the District of Columbia for the common-law torts. (11/9/12 Judgment; *see* Pet. App. 121a & n.4.) It separately ordered Parker and Campanale (but not the District) to pay respondents' attorneys' fees under 42 U.S.C. § 1988. (2/5/13 Order on Mot. for Fees.) This has now brought the total award against the two officers to over $1 million. (*See* 2/5/13 Order on Mot. for Fees; 5/23/16 Order on Supp. Mots. for Fees.)

C. The Court of Appeals' Opinion.

A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's judgment. The court of appeals majority found no probable cause for the arrests, applying the same analysis for the Fourth Amendment and common-law false arrest claims. (Pet. App. 7a-17a.) It asked whether the officers had "at least *some*

evidence" that respondents knew or should have known that their entry was unauthorized—a mental state that, the court held, went to an element of the trespassing crime rather than just a potential defense. (Pet. App. 9a-11a.)

The court of appeals reasoned that "in the absence of any conflicting information, Peaches' invitation vitiates th[is] necessary element" of trespass. (Pet. App. 11a.) It explained: "A reasonably prudent officer aware that [respondents] gathered pursuant to an invitation from someone with apparent (if illusory) authority could not conclude that they had entered unlawfully." (Pet. App. 11a.) According to the court, the homeowner's statement that respondents had entered unlawfully was not "sufficient" for probable cause since the homeowner "never said *that he or anyone else had told* [*respondents*] that they were" unwelcome. (Pet. App. 12a.)

The court of appeals rejected as "beside the point" the argument that the officers need not "sift through conflicting evidence or resolve issues of credibility." (Pet. App. 12a n.4.) It did so because it thought that the officers did not "observe anything" supporting the mental state required for trespassing. (Pet. App. 12a n.4.) The court further explained that there was "no evidence that the officers asked either Peaches or [the homeowner] whether [*respondents*] knew that Peaches had no right to be in the house." (Pet. App. 12a n.4.) The court continued: "Had [the officers] asked such questions and gotten an affirmative answer, [then petitioners'] argument would carry weight." (Pet. App. 12a n.4.) The court thus thought "there was no probable cause for the officers to believe that [respondents] entered the house" with a culpable mental state. (Pet. App. 12a-13a.)

The court of appeals also dismissed some of the facts on which the officers relied for probable cause, thus necessarily finding that these facts did not constitute "conflicting information" that would permit the officers to doubt the evidence of "Peaches' invitation." (*See* Pet. App. 11a, 126a.) It explained that "[t]o the extent that people scattered or hid when the police entered the house, such behavior may be 'suggestive' of wrongdoing, but is not sufficient standing alone to create probable cause." (Pet. App. 16a.) The court also rejected the view that the vacant "condition of the house, on its own, should have alerted the [partiers] that they were unwelcome." (Pet. App. 16a.) Such condition, the court concluded, was "entirely consistent with" a belief that "Peaches" might be a new tenant. (Pet. App. 16a-17a.)

The court of appeals also upheld the denial of qualified immunity. (Pet. App. 21a-24a.) It recognized that no case had "invalidated an arrest for [trespassing] under similar circumstances." (Pet. App. 22a.) In the court's view, however, it was enough that the law was clearly established in the following respects: that "probable cause to arrest requires at least some evidence that the arrestee's conduct meets each of the necessary elements of the offense . . . , including any state-of-mind element"; and that the state-of-mind element for trespassing is that a suspect knew or should have known that his entry was unwelcome. (Pet. App. 23a.) The court of appeals also ruled that Officers Parker and Campanale could not reasonably rely on their supervisor's arrest order, and that they were liable for all of the arrests because they were the "hub" of the preceding investigation. (Pet. App. 28a-29a.) The court rejected the officers' defense of privilege on the common-law false arrest claim "for

essentially the same reasons" as it rejected qualified immunity. (Pet. App. 30a.)

Judge Brown dissented, objecting to the "impossible standard for finding probable cause the court [adopted]." (Pet. App. 33a.) She explained that the "decision undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden." (Pet. App. 34a.) This heightened burden, under which "all but the most implausible claims of invitation must be credited," "radically narrows the capacity of officers to use their experience and prudent judgment to assess the credibility of the self-interested statements of [suspects]." (Pet. App. 38a.) Judge Brown found the court's holding contrary to the "very purpose of a totality of the circumstances inquiry," which is "to allow law enforcement officers to approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism, and decline to give credence to evidence the officers deem unreliable under the circumstances." (Pet. App. 38a.)

Judge Brown concluded that the "circumstances surrounding the arrest[s] were sufficient to support the inference that the suspects knew or reasonably should have known their entry was unlawful." (Pet. App. 37a.) In particular, she found it relevant that the lawful owner had not permitted anyone to enter; the house was vacant and appeared so; the partiers ran and hid from police, gave police conflicting accounts about why they were there, and purported to rely on the invitation of someone who was not present; and when reached by phone, the purported inviter was uncooperative and untruthful with police. (Pet. App. 36a-39a.)

Judge Brown additionally opined that qualified immunity applied even if probable cause were lacking. (Pet. App. 41a-44a.) As she explained, the law had not previously required "officers to credit the statement of the intruders regarding their own purportedly innocent mental state where the surrounding facts and circumstances cast doubt on the veracity of such claims." (Pet. App. 43a-44a.)

D. The Court of Appeals' Denial of Rehearing En Banc.

Over a written dissent joined by four judges, the court of appeals denied rehearing en banc. In a statement concurring in the denial, the panel majority proclaimed that "there is nothing novel about our view." (Pet. App. 106a.) It characterized its opinion as recognizing that "so long as there is evidence giving rise to probable cause—even if that evidence is only circumstantial and short of preponderant—officers may lawfully arrest, no matter what a suspect claims in his or her own defense." (Pet. App. 106a.) The panel majority also insisted that its opinion recognizes the "important protection" of qualified immunity but "simply finds that a reasonable officer could not conclude, based on the information before *these particular officers*, that there was probable cause." (Pet. App. 107a.)

Judge Kavanaugh, joined by Judges Henderson, Brown, and Griffith, dissented from the denial of rehearing en banc. He indicated that petitioners had probable cause to arrest (Pet. App. 122a, 138a) and that, in any event, Officers Parker and Campanale at least deserved qualified immunity (Pet. App. 122a-123a, 132a). Judge Kavanaugh believed that rehearing en banc was necessary because "the panel opinion will negatively affect the ability of . . . police officers to

make on-the-spot credibility judgments that are essential for officers to perform their dangerous jobs and protect the public." (Pet. App. 118a.)

Judge Kavanaugh disagreed with the panel opinion's probable cause standard. (Pet. App. 125a-126a.) He queried: "In a case like this where the actus reas is complete and the sole issue is the defendant's mens rea . . . [,] are police officers always required to believe the statements of the suspects . . . ?" (Pet. App. 125a-126a.) Judge Kavanaugh recognized that the panel opinion "seems to say yes, at least for this kind of case." (Pet. App. 126a.) He explained that the panel opinion required officers to credit the suspects' statements "in the absence of any conflicting information" and that, under the panel's approach, reasonable doubts about the suspects' credibility "do not count as 'conflicting information.'" (Pet. App. 126a.)

Judge Kavanaugh wrote: "The panel opinion's approach is not and has never been the law." (Pet. App. 126a.) He noted that police officers "often hear a variety of mens rea-related excuses" from persons apparently engaged in criminal activity. (Pet. App. 126a.) When this happens, "police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present." (Pet. App. 126a.) He noted that "[a]lmost every court of appeals has recognized that officers cannot be expectedly to *definitively* resolve difficult mens rea questions in the few moments" available to them. (Pet. App. 127a-130a (citing cases).)

Judge Kavanaugh further recognized that "the panel opinion did what the Supreme Court has repeatedly told us not to do: [it] created a new rule and then applied that new rule retroactively against the police officers." (Pet. App. 136a.) As he noted, "the most relevant D.C. trespassing cases *supported* arrest in this kind of case." (Pet. App. 134a-135a (citing *Artisst v. United States*, 554 A.2d 327, 330 n.1 (D.C. 1989), and *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967).) Moreover, it was "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* arrest under D.C. law in these circumstances." (Pet. App. 136a.) Judge Kavanaugh wrote: "Whatever the merits of the panel opinion's new rule—and I think it is divorced from the real world that police officers face on a regular basis—it is still a new rule." (Pet. App. 137a.) As a result, he concluded that "[t]his should have been a fairly easy case for qualified immunity." (Pet. App. 136a.)

SUMMARY OF ARGUMENT

When police officers encounter apparent criminal activity, the Constitution requires them to act reasonably, not infallibly, on the facts known to them. These facts necessarily are considered from their perspective; officers are not, and cannot be, required to see through suspects' eyes or know their thoughts.

Considered from the proper perspective, the facts here established probable cause to arrest respondents for trespassing into a private home. They contest whether there was a reasonable ground to believe their guilt only by claiming there was no evidence that they knew, or even should have known, they lacked permission to be there. But the officers had found an unauthorized, late-night party in an unfurnished home that was supposed to be vacant and looked

unattended. The party involved illicit activities that are often associated with trespassing, and that the absent owner would have been quite unlikely to authorize. The partiers fled and hid at the officers' approach. And they were evasive and inconsistent in later trying to explain their presence. An experienced officer using common sense could reasonably think they knew or should have known that they were trespassing.

Against all this, the partiers rely on how some of them claimed an invitation by someone identified only as "Peaches" who was not on the scene. A reasonable officer could think this claim made their guilt more likely, not less. When police reached "Peaches" by phone, she too was evasive. She also refused to return to the scene, and she lied that she had the owner's authority to be in the home before finally admitting to the contrary. Given how this admitted trespasser and the partiers had engaged in a common enterprise, there was a fair inference that they had shared pertinent knowledge to further their common interest. At bare minimum, the officers did not have to accept this supposed corroboration of the partiers' claim of an invitation. "Peaches" lacked credibility and could not easily be held accountable for anything she said; police did not even have her real name.

Yet, according to the court of appeals, this claimed invitation precluded officers from reasonably believing even that the partiers should have known that they lacked the owner's permission. The court required the police to credit the dubious claim of invitation absent direct, affirmative proof of a culpable mental state. The probable cause standard does not function in this manner, and cannot if officers are to do their job protecting the public from crime, on the scene and with very limited time or ability to figure out the true

mental state of a suspect offering up an innocent explanation. The Fourth Amendment's reasonableness standard is a practical one, and practical considerations require that on-scene officers have wide latitude to make credibility determinations without fear that a judge later will disagree and hold them liable.

The court of appeals further disregarded practical concerns by requiring officers to act like lawyers. Under its heightened probable cause standard, the court required them to consider probable cause separately on each element of the offense, and then to consider whether they had direct rather than circumstantial proof of mental state. But the fluid and flexible probable cause standard requires just a fair probability of guilt on the offense as a whole. It does not require officers to undertake an intricate and lawyerly analysis before presenting an arrestee for potential prosecution. Nor does it require them to predict how courts will resolve difficult legal issues, and here a reasonable officer could have understood prevailing case law to make the partiers' claim of a reasonable, good-faith belief in their right of entry relevant only to an affirmative defense for trial, not an element of the crime of trespass.

The court of appeals still more clearly erred in denying the on-scene officers qualified immunity. It relied on generalized propositions that did not provide the officers fair notice that the arrests were unlawful in the particular situation here. Relevant court decisions supported arrests and even convictions under similar facts, while none found probable cause to be lacking under remotely comparable circumstances. The unconstitutionality of the arrests was not clearly established, as there was at least *arguable*

probable cause. Indeed, four dissenting judges below thought that the officers *did* have probable cause, and this Court should agree. Based on either probable cause or qualified immunity, the judgment below cannot stand.

ARGUMENT

I. Considered From The Perspective Of A Reasonable Officer On The Scene, The Totality Of The Circumstances Provided Probable Cause To Arrest Respondents For Trespassing.

"The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The Court thus analyzes the constitutionality of a seizure "from the perspective of a reasonable officer on the scene," *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (internal quotation marks omitted); *see Illinois v. Gates*, 462 U.S. 213, 231-32 (1983), in light of what is "practical and common-sensical," *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). This analysis recognizes the difficulties facing officers who, confronted with an apparent crime in their presence, must decide in a short time, and with necessarily limited information, whether to arrest.

Probable cause "is not a high bar." *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014). It requires only the "kind of 'fair probability' on which 'reasonable and prudent people, not legal technicians, act.'" *Id.* (brackets omitted) (quoting *Gates*, 462 U.S. at 238). The Court consistently rejects attempts to require on-scene officers assessing probable cause to apply "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach" looking to the "totality of the circumstances." *Harris*, 133 S. Ct. at 1055. "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of

the evidence . . . have no place in the probable-cause decision." *Id.* (brackets omitted) (quoting *Gates*, 462 U.S. at 235). Thus, probable cause to arrest is simply a "reasonable ground for belief of [the arrestee's] guilt" when the historical facts leading up to the arrest are considered from "the standpoint of an objectively reasonable police officer." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

What the officers undisputedly knew here was enough to establish probable cause to arrest for criminal trespass—or, at bare minimum, to foreclose the contrary view at summary judgment. The officers did not have to credit the partiers' claim that they reasonably believed they had a right to be in the home, when officers had confirmed that they had no such right and had strong circumstantial evidence that the partiers knew or at least should have known as much. The officers could instead arrest and let prosecutors decide whether to try to prove these apparent trespassers' guilt beyond a reasonable doubt. And since all of the partiers' claims, under the Fourth Amendment and the common law, depended on the lack of constitutional probable cause to arrest (Pet. App. 7a, 30a, 63a), they all fail.

A. The officers had a reasonable basis on these facts to think that the partiers had committed trespass, and in particular that they knew or should have known they had no right to be in the home.

1. The officers knew that the partiers lacked the right to be in the home, had obvious reasons to think their entry was unauthorized, and acted suspiciously.

a. There is no dispute that the statutory elements of criminal trespass were met in this case: "(1) entry

[of a private dwelling] that is (2) unauthorized—because it is without lawful authority and against the will of the owner or lawful occupant." *Cartledge v. United States*, 100 A.3d 147, 149 (D.C. 2014); *accord* D.C. Code § 22-3302 (2008). Each of the partiers had entered the home. (Pet. App. 47a.) The property owner informed police that the partiers' entry was against his will. (J.A. 99-100.) While "Peaches" initially told police that the owner had permitted her to use the home, she soon confessed to police that he had not given such permission. (J.A. 53-54.) And there is also no claim that the entry, despite being against the owner's will, was nevertheless with "lawful authority"; the partiers were not, for example, police officers executing a search warrant. *See Cartledge*, 100 A.3d at 149.

Instead, respondents try to attack probable cause by claiming that they had a reasonable, good-faith belief in their right to enter based on the purported invitation of "Peaches." This belief, they contend, negated the mental state that they say was required for the offense, even though not found in the statutory text: that they knew or should have known that they lacked the owner's permission. But even assuming for the moment that the arresting officers had to understand this mental state as an offense element, rather than an affirmative defense, the claim of invitation did not overcome the totality of the circumstances establishing probable cause.

To begin, the police officers were faced with an undisputed entry into a private home contrary to the owner's will. A reasonable officer was entitled to use common sense to infer that the apparent trespassers knew, or at least should have known, that they were trespassing. A prudent officer would know that people

acting reasonably and in good faith, as the partiers claimed they were, do not ordinarily end up in other people's homes without permission. In this situation as in many others, a culpable mental state "may be inferred from the act." *Henderson v. Morgan*, 426 U.S. 637, 646 n.17 (1976); *see United States v. Aguilar*, 515 U.S. 593, 613 (1995) (Scalia, J., dissenting) ("[T]he jury is entitled to presume that a person intends the natural and probable consequences of his acts."). If a jury in a criminal trial may draw such an inference beyond a reasonable doubt, an objectively reasonable police officer, assessing probable cause, may draw this inference too. *See, e.g.*, *United States v. Mousli*, 511 F.3d 7, 16 (1st Cir. 2007) (finding sufficient evidence to support counterfeiting conviction because the defendant's printing of several fake bills, though of poor quality, permitted an inference of intent to defraud); *Jordan v. Mosley*, 487 F.3d 1350, 1355 (11th Cir. 2007) (reasoning that the fact that a person damaged property "provides some evidence to believe that [he] intended to damage" the property).

b. This inference was especially reasonable in the circumstances here. Other clear signs—obvious to the police and the partiers—indicated that the partiers' entry was contrary to the owner's will. This was a large party in a vacant home, late at night, with no actual or purported owner or tenant present—not Hughes, and not even "Peaches." (Pet. App. 47a-48a; J.A. 97-99.) Neighbors told the police that the home was supposed to be vacant and had been vacant for months. (J.A. 112, 131.) The home was essentially unfurnished—with only a mattress on the floor and some folding chairs—and in "a state of disarray." (Pet. App. 4a; J.A. 96-97, 112.)

These circumstances strongly suggested that the partiers' presence had not been authorized by anyone with lawful authority. An objectively reasonable officer could think that the partiers knowingly were taking advantage of an absent property owner who could not regularly monitor the home and thus take action against their late-night entry. At minimum, it was reasonable to believe that those attending the party should have known that their entry was unwanted in these circumstances, and that any failure to know was culpable, whether due to carelessness or willful blindness. *See, e.g.*, *United States v. Garrett*, 984 F.2d 1402, 1413 (5th Cir. 1993) (upholding conviction based on sufficient evidence that defendant, when entering a secured area, "should have known" that she had a gun in a bag despite her denial of knowledge).

Trespassing in vacant homes, sometimes by large groups, is a frequent and well-known problem, and was around that time. *See, e.g.*, Jonathan Mummolo & Bill Brubaker, *As Foreclosed Homes Empty, Crime Arrives*, Wash. Post, Apr. 27, 2008, at A1. Trespassers target vacant homes to use not only for unauthorized parties, but also for other illegal activities, including drug use and prostitution. William Spelman, *Abandoned Houses: Magnets for Crime?*, 21 J. Crim. Just. 481, 488-89 (1993).[3] Indeed, just the year before the arrests

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[3] Officers nationwide respond to complaints about parties held without the owner's permission in vacant homes, in diverse factual scenarios. *See, e.g.*, Ken MacLeod, *Underage Drinking Party Busted At $1.2M Home Up For Sale*, CBS Boston (Nov. 16, 2016), http://boston.cbslocal.com/2016/11/16/underage-drinking-party-busted-nh-home-for-sale; Nathan Tempey, *Airbnb Scammer Wrecks Williamsburg Family's Home in Epic Rager*, Gothamist (Sept. 30, 2016), http://gothamist.com/2016/09/30/airbnb_gone_wrong_williamsburg.php; Lupita Murillo, *Crime Trackers: Mansion Parties*, News 4 Tucson (Sept. 14, 2016), http://www.kvoa.com/

at issue, the District of Columbia's legislature had acted to combat the prevalence of trespassing in vacant buildings, amending the trespass statute to facilitate prosecution in these circumstances. *See* D.C. Code § 22-3302 (2008) ("The presence of a person in any private dwelling . . . that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered . . . shall be prima facie evidence that any person found in such property has entered against the will of the [owner].") (as amended by D.C. Law 16-306, § 219, 53 D.C. Reg. 8610, 8637 (2007)). District of Columbia courts have also long recognized that a person's presence in a vacant home, not his or her own, suggests that the entry was unlawful. *See Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985).

The partiers' illicit actions in the home further gave officers grounds to believe that they knew or should have known their entry was unapproved. Officers smelled marijuana in the house. (J.A. 97-98, 131.) They further observed activities consistent with a for-profit strip club. (J.A. 112.) Scantily dressed women in garter belts stuffed with money were downstairs, one naked woman and several men were upstairs, and there was evidence of sexual acts in exchange for money. (J.A. 50, 73-74, 112, 115-18, 122-23, 154; C.A. App. 87.) It would have been obvious to anyone that

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story/32935553/crime-trackers-mansion-parties; Eric Kurhi, *San Jose: SWAT Team Breaks up Rowdy Party at Vacant House*, The Mercury News (Aug. 11, 2016), http://www.mercurynews.com/2016/07/24/san-jose-swat-team-breaks-up-rowdy-party-at-vacant-house/; Hudson Sangree, *Teens Throw Illegal Party at New Home in El Dorado Hills Subdivision*, The Sacramento Bee (Mar. 14, 2016), http://www.sacbee.com/news/local/crime/article66004777.html.

a typical homeowner or resident, absent from the premises, would not normally surrender the home to a group of people to party with illegal drugs and strippers in this manner. This is particularly true since public nuisance laws, like those in the District, subject a property owner to enforcement action and various penalties when a property is used for drugs or prostitution. *See* D.C. Code §§ 22-2713 to -2720 (2008); 24 Am. Jur. 2d *Disorderly Houses* §§ 1-46 (2017). At the very least, ingrained social norms about the sanctity of the home gave notice to the partiers that their conduct was likely unwelcome to the owner.

c. Even setting all that aside, the partiers' conduct in response to the police was highly suspicious and evinced consciousness of guilt. When uniformed officers knocked and entered, the partiers scattered and hid. (J.A. 112, 143.) One was found hiding in an upstairs closet. (J.A. 177.) This provided strong indication that the partiers in fact knew or suspected that their presence was unlawful. As this Court has explained, "deliberately furtive actions and flight at the approach of strangers or law enforcement officers are strong indicia of *mens rea*." *Peters v. New York*, 392 U.S. 40, 66 (1968); *see Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (explaining similarly that flight, though "not necessarily indicative of wrongdoing, . . . is certainly suggestive of such"). Thus, when such actions are "coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Peters*, 392 U.S. at 66-67.

The partiers also could not adequately explain their presence. When police asked who owned the home, the partiers had no answer. (J.A. 52-53, 67.) Eventually, one of the partiers stated that "Peaches" had invited

them, but others told the police that they were there at the invitation of someone else. (J.A. 135.) It is telling that the partiers responded this way while the officers were trying to figure out why the partiers were in someone else's house. The inconsistent and incomplete explanations only further supported probable cause. *See, e.g., United States v. Ameling*, 328 F.3d 443, 448-49 (8th Cir. 2003) (holding that prior grounds for suspicion, combined with the suspects' "inconsistent accounts of their time in town," established probable cause that they had been there for criminal activity).

2. *A reasonable officer could think the partiers' common enterprise with "Peaches" made their own guilt more likely, not less, and at least could discredit their claim of reliance on an invitation by this admitted trespasser.*

The lynchpin of the partiers' contrary case is their purported invitation into the home by "Peaches," which they say defeated any reasonable belief that they knew or should have known that they had no right of entry. To the contrary, given what was known of "Peaches," a reasonable officer was entitled to believe their common enterprise with her heightened the possibility that they had committed a crime. At minimum, officers did not have to credit that the partiers actually and reasonably relied on this supposed invitation despite all the other indicia of a guilty state of mind.

"Peaches" was an admitted trespasser. She knew that she and the partiers lacked permission to be in the home, yet she entered it and purportedly invited at least some of the partiers to do the same. (J.A. 53-54.) She also attempted to avoid and mislead the police. (J.A. 53-54.) When they contacted her by

phone, she was evasive, she repeatedly hung up on the officers, and she refused to return to the scene because she said she would be arrested. (J.A. 165.) She also initially claimed that she had authority to be in the home before later admitting to police, prior to the arrests, that she had no such authority. (J.A. 53-54.)

a. Since "Peaches" and the partiers were engaged in a common enterprise, an officer might fairly impute her knowledge about the lack of authority to the partiers. "Peaches" and the partiers may have shared the pertinent details of their planned gathering, including the fact that they did not have permission to have their party at their chosen location. This fact would have been highly relevant to the choice of location as well as the overall conduct and success of their enterprise. It was foreseeable that someone might come by the house to question the partiers' authority to be there. "Peaches" had some incentive to make the partiers aware of the lack of authority, so that they could avoid attracting undue suspicion and, if necessary, dodge or deflect any such inquiry. She also had disincentive to invite innocent persons, who might be quick to implicate her if their presence were questioned.

The Court's decision in *Pringle* is analogous in pertinent respects. There, police stopped a speeding car with three occupants: the driver and owner of the car, a front-seat passenger, and a backseat passenger. 540 U.S. at 368. A search revealed $763 in cash in the glove compartment and five baggies of cocaine behind the backseat armrest. *Id.* After no one admitted ownership of the drugs, police arrested all three for possession. *Id.* at 368-69. This Court unanimously found probable cause to arrest the front-seat passenger, even though he was not the car's owner or driver, or even in the backseat where the drugs were hidden.

Id. at 372. It held that it was "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion or control over, the cocaine." *Id.* This was not "guilt by association"—rather, the Court explained, it was reasonable to infer a common enterprise among the three occupants. *Id.* at 373.

Like the officers in *Pringle*, the officers here knew that a crime had been committed, and the only question was whether there was probable cause to arrest all of the occupants. While in *Pringle* there was a need to infer a common enterprise among them, here a common enterprise was undisputed: the partiers admittedly arranged with "Peaches" to enter and use a private home for the party. (J.A. 53.) As in *Pringle*, the existence of the common enterprise permitted the reasonable inference of shared knowledge among those involved. In *Pringle*, the shared knowledge (and control) was that of drugs; here, it was the shared knowledge that the entry and the party were unauthorized. 540 U.S. at 373; *see also Dumbra v. United States*, 268 U.S. 435, 440-41 (1925) (finding probable cause that a winery owner possessed wine for an unlawful purpose, despite a permit, based on actions of family members apparently associated with his business).

b. At the very least, a reasonable officer had grounds to discredit whether the partiers in fact had relied on an invitation—and *reasonably* so—even if "Peaches" said she had invited them. She could not provide credible corroboration of the partiers' claim of a legitimate invitation.

"Peaches" had proven herself to lack credibility. As the police knew, she tried to evade their inquiries by phone, and she refused to return to the home so that

they could speak to her in person. (J.A. 53-54, 165.) The police also knew that "Peaches" had lied to them about a central issue in their on-scene investigation: whether anyone had permission to be in the home. She falsely told the police that she had the owner's authority before admitting to them otherwise. (J.A. 53-54.) This evasive behavior and false statement deprived her other statements to police of credibility.

A further reason why the officers did not have to accept her purported corroboration is that they knew she may have felt able to say anything she wanted with impunity. Not only did "Peaches" refuse to make herself available to the officers by returning to the home, she was not even identified by actual name. (J.A. 53, 97, 131, 135.) All police had, at least at that point, was a pseudonym on a cell phone. She thus had—or at least could have felt—considerable impunity to make false statements without fear of repercussion. She could attempt a cover-up to protect her fellow partiers (perhaps hoping they might also further protect her), with the sound expectation that she would not face legal consequences for doing so.

The officers were not required to accept the partiers' claim of reasonable reliance on an invitation when the corroboration that was offered proved untrustworthy. *See Wright v. West*, 505 U.S. 277, 296 (1992) (plurality op.) (recognizing that a jury was entitled to disbelieve the accused's uncorroborated testimony innocently explaining possession of stolen property); *Peters*, 392 U.S. at 49, 66-67 (finding probable cause to arrest for attempted burglary despite the suspect's explanation that he was in the apartment building to visit a girlfriend whom he did not name because she was married).

Indeed, it was a fair inference that the partiers and "Peaches," furthering their common enterprise, concocted the alleged invitation either beforehand, anticipating that the partiers' presence might be questioned, or afterwards (by phone or text), once police arrived at the home. It was also reasonable to infer from these facts that, even if "Peaches" had conveyed an "invitation," she did so in a manner that alerted or suggested that she was without actual authority to do so. Alternatively, even if "Peaches" had not so much as hinted to the partiers about her lack of authority, a reasonable officer could infer, from all of the suspicious circumstances that night, that the partiers still knew that they were not permitted to be there. Or a reasonable officer could infer that they at least should have known, even if they honestly believed they had received a legitimate invitation. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("Th[e totality-of-the-circumstances test] allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them . . . ."). For all these reasons, officers were not required to accept the partiers' word as the end of the matter.

B. The court of appeals' errors of law made its version of probable cause too demanding, inflexible, and impractical.

The historical facts leading to the arrest thus justified an objectively reasonable belief that the partiers had committed trespass. In holding otherwise, the court of appeals failed to adhere to two fundamental legal tenets. First, on-scene officers should not be required to correctly and definitively resolve a suspect's claim of an innocent mental state. Second, on-scene officers should not be required to act like

lawyers parsing doctrine as to each element of a crime—especially where the putative "element" reasonably might have been thought an affirmative defense instead.

Although probable cause requires only "fair probability" as assessed by "reasonable and prudent" people, not "legal technicians," *Kaley*, 134 S. Ct. at 1103, the court of appeals set the bar much higher as a result of these legal errors. Indeed, as aptly described by Judge Brown's dissent, it set an "impossible standard" for probable cause. (Pet. App. 33a.)

1. On-scene officers should not be held liable for failing to correctly and definitively resolve a suspect's claim of an innocent mental state.

The court of appeals held that the purported invitation of "Peaches" vitiated any belief that the partiers knew or should have known that their presence was unauthorized, at least "in the absence of any conflicting information." (Pet. App. 11a.) In the court's view, the reasonable circumstantial grounds that officers had to doubt the partiers' story did not count as the "conflicting information" it required for probable cause. (Pet. App. 11a-12a & n.4.) The court instead demanded direct, affirmative proof of their state of mind, such as a statement from "Peaches" or the homeowner that the partiers knew that their entry was unlawful. (Pet. App. 11a-12a & n.4.) This heightened probable cause standard is impractical, and it improperly disregards how probable cause is considered from the perspective of a reasonable officer, who understandably is limited to what is knowable.

a. In most arrest situations, on-scene officers will have only limited, circumstantial evidence of *mens rea*. "Absent a confession, the officer . . . will always be

required to rely on circumstantial evidence regarding the state of [the suspect's] mind." *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000). Frequently, officers will have no witness who is able, or willing, to offer information on the suspect's mental state. A person engaged in unlawful conduct "does not often contemporaneously speak or write out his [or her] thoughts for others to hear or read." 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(f) (2d ed. 2016). Due to such inherent limitations, "it is impossible for a police officer to ascertain with any degree of certainty that a [suspect] possessed a particular state of mind at the time of the commission of some act." *Krause v. Bennett*, 887 F.2d 362, 371 (2d Cir. 1989). Because "the practical restraints on police in the field" in ascertaining intent are enormous, "the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great." *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004).

It cannot be that, because state-of-mind evidence is limited, officers must accept a suspect's claim of an innocent mental state. "Rarely will a suspect fail to proffer an innocent explanation for his suspicious behavior." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009). For example, suspects commonly deny knowledge when contraband is found. *See, e.g.*, *Pringle*, 540 U.S. at 368 (cocaine and money in car); *United States v. Schene*, 543 F.3d 627, 632 (10th Cir. 2008) (child pornography on home computer); *United States v. Jernigan*, 341 F.3d 1273, 1276 (11th Cir. 2003) (gun in truck); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1265 (10th Cir. 2000) (drugs in suitcase). Persons caught in criminal activity might also claim that they relied in good faith on others, *see United States v. Renner*, 648 F.3d 680, 684-85 (8th Cir. 2011) (tax evasion), or were just innocent

dupes in another's criminal scheme, *see United States v. Iwuala*, 789 F.3d 1, 4 (1st Cir. 2015) (health-care fraud); *United States v. Anderson*, 755 F.3d 782, 789 (5th Cir. 2014) (aiding bank robbery).

Trespassing is no different. Apparent trespassers can offer a variety of "good-faith" claims, beyond just a claim of invitation, to deny a culpable mental state. If they had not been previously warned off by the property owner—or even if they *had* been—they could contend that they had been unaware that their entry was unwelcome. The intruders might claim that they failed to see "no trespassing" signs, *see Considine v. Jagodinski*, 646 F. App'x 283, 285 (3d Cir. 2016), or failed to recognize that a prior owner's objection carried over to a new owner, *see Borgman v. Kedley*, 646 F.3d 518, 524 (8th Cir. 2011). Even if their entry was against the owner's express objection, they might claim good faith based on some asserted property interest of their own. *See Zimmerman v. Doran*, 807 F.3d 178, 182-84 (7th Cir. 2015) (timber deed); *Finigan v. Marshall*, 574 F.3d 57, 61-63 (2d Cir. 2009) (legal title shared with estranged spouse). Intruders might also question the private property owner's claim of right by asserting a belief that they were actually on public land. *See Bodzin v. City of Dall.*, 768 F.2d 722, 723-25 (5th Cir. 1985). Officers regularly have to assess, on the spot, the credibility of these claims.

Such claims cannot negate probable cause if there is an objectively reasonable basis to discredit them. The court of appeals' decision undercuts an officer's ability to use his or her experience, judgment, and direct observations to assess the credibility of a suspect's innocent state-of-mind explanation. *See Ornelas v. United States*, 517 U.S. 690, 700 (1996) (explaining that "a police officer may draw inferences based on

his own experience in deciding whether probable cause exists"). In the real world in which they function, police officers must "approach such ambiguous facts and self-interested or unreliable statements with an appropriately healthy dose of skepticism." (Pet. App. 38a.) Otherwise, those caught in apparent criminal activity could generally avoid arrest simply by asserting an innocent mental state. Even if officers disbelieved such assertions, the approach of the court of appeals here would lead them to forgo arrests for fear that a judge, far removed from the scene and years later, might make a different credibility judgment and then hold them personally liable.

Probable cause does not require that officers correctly resolve questionable claims of an innocent mental state. Instead, if the prosecutor chooses to press charges, the credibility of such claims ultimately is for the fact-finder at a criminal trial. *Wright*, 505 U.S. at 277, 296. This Court has "left to the trier of fact" whether circumstantial evidence proves the defendant's knowledge, *McFadden v. United States*, 135 S. Ct. 2298, 2306 n.3 (2015), or whether the defendant's "profession of innocent intent" should be believed, *Morissette v. United States*, 342 U.S. 246, 276 (1952). Perhaps at a criminal trial, a judge or jury weighing the evidence might have concluded as did the court of appeals: the partiers' entry, though unauthorized, was not culpable. But it is the role of the judge or jury, not the police officer, to finally determine guilt, including whether the accused acted with the "requisite intent." *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979); *accord Marks v. Carmody*, 234 F.3d 1006, 1009 (7th Cir. 2000) (holding that arresting officers did not have to believe evidence of lack of intent since "issues of mental state and credibility are for judges and juries to decide").

The factfinder cannot even determine guilt if police are precluded from making the arrest in the first place.

b. The Court thus should reject the suggestion below that the claim of invitation could only be overcome with "conflicting information" in the form of direct—as opposed to circumstantial—evidence. (Pet. App. 11a-12a & n.4, 33a-34a.) As Judge Brown recognized, "[t]he absence of direct, affirmative proof of a culpable mental state is not the same thing as undisputed evidence of innocence." (Pet. App. 33a.) In *Pringle*, the decision under review had required "specific facts tending to show Pringle's knowledge and dominion or control over the drugs." 540 U.S. at 369. This Court disagreed. Even without such specific facts, this Court thought it "an entirely reasonable inference" that Pringle knew about the cocaine in the car. *Id.* at 372. The court of appeals here erred in much the same way.

Indeed, this Court has repeatedly cautioned against imposing doctrinal requirements for probable cause in this manner. "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest . . . is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Thus, in *Gates*, the Court abandoned a test for informant reliability "because it had devolved into a 'complex superstructure of evidentiary and analytical rules,' any one of which, if not complied with, would derail a finding of probable cause." *Harris*, 133 S. Ct. at 1056 (quoting *Gates*, 462 U.S. at 235). And recently the Court in *Harris* rejected, as a prerequisite for probable cause, a

"strict evidentiary checklist" assessing the reliability of a drug-detection dog. *Id.* Probable cause, after all, is "not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232.

c. While the court of appeals later denied that it was applying a heightened probable cause standard (Pet. App. 105a-106a), it provided no other basis for disregarding all the reasonable grounds to doubt the partiers' story. The court dismissed some of the suspicious facts by viewing them in improper isolation. It explained that the partiers' act of scattering and hiding upon the uniformed officers' arrival is "not sufficient *standing alone* to create probable cause." (Pet. App. 16a (emphasis added).) It likewise concluded that the vacant "condition of the house, *on its own*," would not have alerted the partiers that something was amiss. (Pet. App. 16a (emphasis added).) Viewing these facts in isolation from each other, and from the other objective bases to discredit the partiers' claim, violated the "totality of the circumstances" test. *Pringle*, 540 U.S. at 372 n.2; *Arvizu*, 534 U.S. at 274.

The court of appeals also improperly dismissed these suspicious facts as "consistent with" the partiers' innocent explanation. (Pet. App. 15a, 16a.) Perhaps, it suggested, the home was vacant because "Peaches" was a new tenant who had not yet bothered to move in. (Pet. App. 16a-17a.) This is not the test for probable cause either. "[I]innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Gates*, 462 U.S. at 245 n.13; *see Wardlow*, 528 U.S. at 124-25 ("[C]ourts do not have available empirical studies dealing with inferences drawn from suspicious behavior,

and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists."). "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Gates*, 462 U.S. at 245.

Even if accepting the innocent explanation would have been reasonable here, so too was drawing the contrary inference that the partiers knew or should have known they were unwelcome. That is enough for probable cause. *See id.* at 245-46; *see also Conner v. Heiman*, 672 F.3d 1126, 1132 (9th Cir. 2012) (recognizing that whether the inference of innocent intent "was also reasonable, or even more reasonable, does not matter so long as the [culpable intent] conclusion was itself reasonable").

d. The court of appeals' heightened probable cause standard has broad implications. While implicating any *mens rea* offense, it imposes a particularly significant obstacle to officers' ability to protect the public against property crimes.

Beyond violating privacy and property rights that alone warrant protection, trespasses are "sufficiently dangerous" to criminalize because, based on "common experience," they are "preparatory acts that frequently lead to burglaries." Ira P. Robbins, *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1, 97 (1989). Since trespass is generally a lesser-included offense of burglary, 3 LaFave, *Substantive Criminal Law* § 21.2, officers will face the same limitation in enforcing laws against burglary as against trespassing.

Even where the trespass does not involve real property, but personal property, similar enforcement

problems would arise. Officers could not arrest a person for unauthorized use of a vehicle if he dubiously claimed to have borrowed it from someone with apparent authority absent direct evidence refuting the claim. Even if the vehicle's owner had reported it stolen, they could not arrest. Officers would likewise have to accept all but the most implausible claims that stolen property found in a suspect's possession was acquired in good faith.

At minimum, the court of appeals' standard provides a recipe for those committing property crimes to evade arrest: just arrange for one off-site conspirator, like "Peaches" here. If the police detected the individual's criminal activity and the owner complained about it, the conspirator could be available by phone to say that she had invited or otherwise authorized the individual's use of the property. She would not have to provide her actual name, come to the scene, or otherwise risk being identified and held accountable for any false statements. In the court of appeals' view, police officers in this situation would be limited to throwing up their hands and politely asking everyone to go on their way. (Pet. App. 17a.)

The court of appeals' heightened standard also sharply restricts the enforcement of criminal laws requiring higher levels of culpability. For the District's trespass statute, no more is required than that the person at least "should have known" that the entry was against the owner's will. *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013). This is an objective standard, which does not require subjective awareness of the risk that entry is unwelcome. *See id.* It is akin to negligence. But negligence is on the low range of culpable mental states, which ascend to recklessness, knowledge, and, ultimately, purpose. Model Penal

Code § 2.02. If the information available to the officers here did not even suffice, on probable cause, for negligence, then the evidence that would be required for these higher levels of culpability would be extraordinary. The court of appeals' approach is untenable.

2. On-scene officers assessing probable cause should not have to apply a technical analysis or predict how courts will resolve complex legal issues.

a. The court of appeals' analysis also requires too much of police officers in a separate way. In holding that officers had to accept the partiers' story, the court of appeals applied a rigid and technical view of probable cause rather than a flexible, common-sense approach. The court in the end required "probable cause" as to each specific element, including whether the partiers knew or should have known that their entry was unauthorized. (Pet. App. 12a-13a, 108a.) Moreover, as discussed, the court held that the circumstantial evidence was insufficient for this element, suggesting that direct, affirmative proof was required instead.

Police officers on the scene, however, need not conduct such a technical analysis. Probable cause does not require officers to sort through the elements of an offense in this manner, precisely identifying every element while carefully separating and weighing the available facts as to each. Probable cause is not "a prima facie showing" of criminal activity, *Gates*, 462 U.S. at 235, and "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972). Instead, probable cause is a "fluid concept." *Harris*, 133 S. Ct. at 1056. Officers investigating criminal activity must apply the concept quickly in an uncertain, evolving, and

often dangerous environment. Even if officers had time to conduct a legal analysis, they are not legal technicians.

b. Relatedly, on-scene officers should not be required to act like lawyers and predict how courts will resolve complicated legal questions. Here, as can often occur, the law was unclear as to the specific elements of the offense. Criminal trespass, as defined in the District's statute, occurs when a person, "without lawful authority . . . enter[s] . . . [a] private dwelling . . . against the will of the lawful occupant or the person lawfully in charge thereof." D.C. Code § 22-3302 (2008). These statutory elements were clearly satisfied here. The statute did not identify any other element, including a *mens rea* requirement. Reviewing the statutory text, on its face, would have only confirmed that the offense occurred and that the arrests were proper.

Probable cause may be present even when dependent on a reasonable view as to the offense elements that is later rejected in the courts. *Heien v. North Carolina*, 135 S. Ct. 530, 536-40 (2014). Studying the case law at the time of the arrests here would not have resolved questions about whether *mens rea* was relevant to an element of the District's criminal trespass statute or instead an affirmative defense. And the officers on the scene did not have to predict the results of the detailed legal analysis of the case law that the court of appeals went on to perform years later. (Pet. App. 10a-11a.)

District of Columbia courts have recognized that, "[i]f a trespass is committed under a bona fide belief of a right to enter, such may be shown in defense." *Whittlesey v. United States*, 221 A.2d 86, 92 (D.C.

1966). The good-faith belief must have "some reasonable basis." *Smith v. United States*, 281 A.2d 438, 439 (D.C. 1971). Also, it "must be based in the pure indicia of innocence"; for example, that the defendant had "no reason to know that he was trespassing on the rights of others." *Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979). This "reasonable, good-faith belief" defense further requires that the entry have been for "a good purpose." *McGloin*, 232 A.2d at 91.

The District of Columbia Court of Appeals has explained that the defendant is entitled to a jury instruction on this defense only if there is a sufficient basis for it. *See Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993); *Abney v. United States*, 616 A.2d 856, 862-63 (D.C. 1992); *Leiss v. United States*, 364 A.2d 803, 809 (D.C. 1976). One of these cases stated that a person who has such a belief "lacks the element of criminal intent required for the offense." *Smith*, 281 A.2d at 439. But another case put it differently: "The elements of the crime [of trespass] are clear" and "not at issue here . . . [but, w]hat is at issue is the defense of a 'bona fide belief.'" *Gaetano*, 406 A.2d at 1293; *see also United States v. Thomas*, 444 F.2d 919, 926 (D.C. Cir. 1971) (listing the elements of criminal trespass and explaining that, by contrast, whether "a person believed he had a right to be in such a building is a matter for the defense"). Other cases indicated just that a "general intent to enter" was an element. *See, e.g.*, *Culp*, 486 A.2d at 1176. Another added that the entry be against the owner's "expressed" will but clarified that this additional requirement does not apply to a private dwelling as here. *See McGloin*, 232 A.2d at 91.

Given the statutory text and the case law, a prudent officer could have understood that a claim of a

reasonable, good-faith belief raised an affirmative defense for trial and did not vitiate probable cause. That is, it was fair for an officer to believe that the accused's mental state, as to whether the entry was unwanted, was not an element of the offense. Because a jury must be instructed "to find each element of the crime," *Cabana v. Bullock*, 474 U.S. 376, 384 (1986), the court's ability to deny an instruction regarding a reasonable, good-faith belief further suggested that it concerned only an affirmative defense. Under this view, the only required mental-state component would have involved the element of "entry": the physical act of entering had to be intentional and voluntary, not accidental. This would have been consistent with any requirement of a "general intent to enter." *See Culp*, 486 A.2d at 1176; 1 LaFave, *Substantive Criminal Law* § 5.2(e) (explaining that, under a common usage, "general intent is only the 'intention to make the bodily movement which constitutes the act which the crime requires'").

As an affirmative defense, a claim of a reasonable, good-faith belief would have to be raised and resolved in the course of trial or other judicial proceedings. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("An affirmative defense applies only after prosecution has begun . . . ."). Even for a grand jury's probable-cause findings, "it has always been thought sufficient to hear only the prosecutor's side"; the suspect's defenses need not be presented. *United States v. Williams*, 504 U.S. 36, 51-52 (1992). While the prosecutor always has the burden of proving the offense elements at trial, the criminal defendant has at least the burden of production, and can have the burden of proof, on any affirmative defense. *Smith v. United States*, 133 S. Ct. 714, 718-19 (2013). Moreover, even when an affirmative defense, if proven, is a

complete defense to a charge, it does not necessarily establish the defendant's innocence; for example, it may merely excuse the crime or prevent prosecution. *Id.* at 719-20. A police officer therefore typically need not resolve an affirmative defense before making an arrest, at least if there were any doubt whether the defense would prevail. *See Holman v. City of York*, 564 F.3d 225, 231 (3d Cir. 2009) (explaining that the affirmative "defense of necessity need not have been considered in the assessment of probable cause for arrest for trespass").

To be sure, years *after* the arrests here, the District of Columbia Court of Appeals held that the government must prove, as an element of criminal trespass, that a defendant "knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308. It explained that "the existence of a reasonable, good faith belief is a valid defense precisely because it precludes the government from proving" this fact. *Id.* at 309. But a reasonable officer need not have anticipated this decision. The *Ortberg* court recognized that prior cases upon which it relied "lacked some precision" and were "less clear" about the culpable mental state than about the *actus reus*. *Id.* at 307. It also noted that prior cases had referenced "general intent" but that this term has caused "a good deal of confusion" and "fails to distinguish between elements of the crime, to which different mental states may apply." *Id.*

Further, even *Ortberg* did not explain how its analysis made sense of the requirement in the case law that the defendant have entered the premises in question not only "with a bona fide belief of his right to enter," but also "with a good purpose." *Id.* at 308 & n.9; *see McGloin*, 232 A.2d at 91; *Bowman v.*

United States, 212 A.2d 610, 611-12 (D.C. 1965). Because entry of a premises on a bona fide belief of invitation but without a good purpose would not have been sufficient before *Ortberg*, a reasonable officer could have concluded that a reasonable, good-faith belief in the right of entry constituted an affirmative defense that did not go to an element of the crime. This reasonable officer could assess probable cause without having to predict that *Ortberg* or the court of appeals here would say otherwise.

c. It is important to ensure that an officer's probable-cause inquiry need not venture into such legal thickets, especially because they are commonplace. This Court often needs to clarify the elements of criminal offenses. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2367-73 (2016) (interpreting what "official act" is required for bribery). It has also cautioned that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). The probable-cause inquiry does not require that on-scene officers wrestle with these legal difficulties. *See, e.g.*, *United States v. Smith*, 459 F.3d 1276, 1292 (11th Cir. 2006) (finding probable cause where an officer "could reasonably have believed that the sexually explicit photographs of what he observed to be very young girls were evidence of a [federal or state] crime . . . without knowing whether the legal technicalities of those crimes had, in fact, been satisfied").

It is for the prosecutor—and ultimately the finder of fact—to analyze the evidence in light of the specific offense elements. The role of the police officer is to initiate the process, by taking the person into custody so that the determination can be made whether or

not to bring criminal charges. In taking custody of the person, the officer need not even correctly identify a specific offense that he or she believes has been committed. *Devenpeck v. Alford*, 543 U.S. 146, 152-56 (2004). Rather, the charging decision is left to prosecutors, who can conduct the proper legal analysis. An arrest can also facilitate the gathering of additional evidence. 2 Wayne R. LaFave, *Search & Seizure* § 3.2(e) (5th ed. 2016). If the prosecutor brings charges, the judicial process will finally resolve any legal questions about what precisely the government must prove and whether the evidence suffices.

This approach upholds this Court's repeated pronouncement that the probable cause standard is a "practical, non-technical conception." *E.g.*, *Pringle*, 540 U.S. at 370. Here, the officers knew that all of the partiers had completed the physical act of trespassing. They also knew that criminal trespass, whatever its mental-state requirements, had certainly been committed at least by "Peaches," who had entered the house earlier despite knowing that no one had authority to be there. Moreover, "Peaches" was not acting alone, but in concert with the partiers, by having the party at the house. Given the totality of the circumstances—many quite suspicious—a reasonable officer could conclude that the partiers too had committed the crime. That conclusion did not need to be grounded in a technical, lawyerly analysis of the offense. It is enough that it be based in the practical judgments that experienced, on-scene officers can reasonably make when they have detected apparent criminal activity.

II. Alternatively, The Officers Are Entitled To Qualified Immunity Because The Law Was Not Clearly Established That An Arrest Under These Facts Lacked Probable Cause.

Even if the arrests were without probable cause, the officers involved are entitled to qualified immunity. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It applies if "a reasonable officer could have believed [the arrests] to be lawful, in light of clearly established law and the information the arresting officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (brackets omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Id.* Because the court of appeals denied the officers' defense to the common-law false arrest claim for "essentially the same reasons" as it denied qualified immunity (Pet. App. 30a), none of the liability findings can stand.[4]

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[4] Before the court of appeals, respondents agreed—or at least did not dispute—that if qualified immunity applied, the arrests would also be privileged under common law. (*See* C.A. Appellants' Br. 38-39; C.A. Appellees' Br. 37.) Similar to qualified immunity, the common-law privilege precludes liability if "the arresting officer believed, reasonably and in good faith, that probable cause existed," even though that belief was mistaken. *Minch v. District of Columbia*, 952 A.2d 929, 937 (D.C. 2008). Here, the only reason given for denying the common-law privilege was the preceding denial of qualified immunity: that officers acted unreasonably in light of clearly established law. (Pet. App. 30a.) Moreover, if the arrests were privileged, the common-law negligent supervision would fail along with the common-law false arrest claim. The court of appeals held the District of Columbia liable for

1. In discussing qualified immunity, this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Rather, this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

The court of appeals failed to follow these instructions on qualified immunity. It reasoned that the law was clearly established in that: (1) probable cause requires "some evidence" of each offense element, including the mental state requirement; and (2) the mental state requirement for trespassing is whether the person "knew or should have known that his entry was unwanted." (Pet. App. 23a.) These two generalized propositions did not give fair notice to the officers whether probable cause to arrest existed in the specific situation they confronted: persons behaving suspiciously at a large party inside a vacant home, late at night, where the lawful owner disclaims their right to be there, but the suspects claim that they were invited by an admitted trespasser who is not present and is uncooperative and untruthful with police.

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negligent supervision because Sergeant Suber supposedly "overstepped clear law in directing the arrests." (Pet. App. 3a.) Because the allegedly "negligent supervision" was nothing more than Sergeant Suber's order to arrest, for which he too deserved the benefit of the common-law privilege, the negligent supervision claim was not "separate and distinct" from the false arrest claim. *See Stewart-Veal v. District of Columbia*, 896 A.2d 232, 235-36 (D.C. 2006).

Like any officer on the scene, Officers Parker and Campanale could have reasonably believed that there was probable cause. They both learned that these late-night partiers had no right to be in the home; indeed, Officer Parker learned this directly from the home-owner. (J.A. 99, 131.) The officers further learned that the house was supposed to be vacant and observed its unfurnished and disordered condition. (J.A. 96-97, 112, 131.) Each of them smelled marijuana and saw, or were told of, facts suggestive of prostitution. (J.A. 73-74, 96-98, 131; C.A. App. 87.) Some partiers claimed to the officers that they had been invited by "Peaches," while others claimed that they had been invited by someone else. (J.A. 97, 135.) And the officers were aware that "Peaches" refused to return to the house and that her own claim that she had the owner's permission was false and misleading. (J.A. 75, 99, 131-32, 165-66.) Probable cause was at least arguable under these facts.

Neither the court of appeals nor the district court cited any case that had found probable cause lacking under even remotely analogous circumstances. Even if it were clearly established that police had to have "some evidence" that the partiers "knew or should have known" that their entry was unwelcome, this in no way suggested that the circumstantial evidence in this case was insufficient. The circumstantial evidence that the officers had here was at least arguably—if not certainly—"some evidence" of the partiers' culpable mental state. This is especially so when the culpable mental state was merely that the partiers "should have known" that their entry was unwanted, even if they did not in fact know.

In fact, the court of appeals went beyond requiring just "*some* evidence" but instead ultimately required

"probable cause" on each "necessary element." (Pet. App. 9a, 12-13a, 108a.) But it did not even assert that it was clearly established that probable cause is necessary for each element of a crime, rather than for the crime as a whole. Indeed, prior to the decision in this case, the District of Columbia Circuit had suggested otherwise, requiring probable cause with regard to a mental-state element only where the element involved, unlike here, "specific intent." *United States v. Christian*, 187 F.3d 663, 666-67 (D.C. Cir. 1999) (citing *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) (recognizing generally that "an officer need not have probable cause for every element of the offense")); *see Spiegel v. Cortese*, 196 F.3d 717, 725 n.1 (7th Cir. 2000) (explaining that it "is not the law" that police must "establish probable cause as to each and every element of a crime").

Moreover, the generalized propositions upon which the court of appeals said it relied, at least as it applied them, were not even clearly established. As discussed, it was not clearly established that an on-scene officer had to accept a suspect's claim of an innocent mental state when reasonable grounds existed to doubt the claim's credibility. (*See supra* at 27-35.) Nor was it clearly established at the time that the particular claim here of an innocent mental state related to an offense element, as opposed to an affirmative defense to be raised at trial. (*See supra* at 36-40.)

Far from clearly establishing the unlawfulness of the arrests, decisions of the District of Columbia Court of Appeals supported (and continue to support) the officers' actions. Those decisions have found probable cause to arrest under similar facts. *See Culp*, 486 A.2d at 1177 (trespassing in vacant home). Moreover, they have also upheld trespassing *convictions* even though

the accused had offered an innocent explanation for being on the property. *See Kozlovska v. United States*, 30 A.3d 799, 800-03 (D.C. 2011) (upholding the conviction of a woman previously barred from a building despite her unrebutted testimony that the superintendent permitted her to use the building, since the factfinder was free to disbelieve her testimony); *Artisst*, 554 A.2d at 330 & n.1 (upholding a conviction even though the accused claimed that he had entered dormitory to buy soccer equipment from a resident and thus lacked the requisite intent); *McGloin*, 232 A.2d at 90-91 (upholding the conviction of a person found in non-public areas of a private apartment building though he told police that he was looking for a cat or a friend who lived in the building). Especially where such evidence has been held to permit a conviction, a reasonable officer could have concluded here that it satisfied the much lower standard of probable cause.

Other decisions of the District of Columbia Court of Appeals had also found probable cause to arrest despite a suspect's claim or evidence of an innocent mental state. *Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 95-97 (D.C. 1997) (evidence suggesting mistaken entry into a restricted area of a transit station where the gate normally demarcating the area was missing and the suspect promptly turned around); *Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 285-86 (D.C. 1974) (claim of lack of intent to steal because intent was to return the item); *Prieto v. May Dep't Stores Co.*, 216 A.2d 577, 578-79 (D.C. 1966) (claim of lack of intent to steal because continued possession of the item was inadvertent). As *Tillman* summarized: "it would be an unusual case where the circumstances, while undoubtedly proving an unlawful act, nonetheless demonstrated so clearly that the

suspect lacked the required intent that the police would not even have probable cause for an arrest." 695 A.2d at 96. Relying on these cases, a reasonable officer could have believed respondents' arrests were lawful.

2. At a minimum, it is "crystal clear" that "[n]o decision prior to the panel opinion here had *prohibited* an arrest under D.C. law in these circumstances." (Pet. App. 136a.) The court of appeals acknowledged as much but then declared: "that is not the applicable standard" for qualified immunity. (Pet. App. 22a.) Of course, as it noted, there is no need that "the very action in question have previously been held unlawful," and officers can violate clearly established law "even in novel factual circumstances." (Pet. App. 22a-23a (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002))). But the denial of qualified immunity still requires that in "light of pre-existing law the unlawfulness [of the officer's actions] must be apparent." *Hope*, 536 U.S. at 739 (quoting *Anderson*, 483 U.S. at 640). Existing precedent must have placed the constitutional question the officers confronted "beyond debate." *Mullenix*, 136 S. Ct. at 308.

Existing precedent did not establish "beyond debate" that probable cause was lacking here. This is far from the "novel" or "obvious" factual situation where general constitutional principles might suffice to give an official fair notice of the unlawfulness of his or her conduct. *Cf. Hope*, 536 U.S. at 734-35, 741 (involving the handcuffing of a prisoner to a hitching post in a painful position for several hours in the hot sun, shirtless, with little water and no bathroom breaks). Police officers often encounter the general type of situation here, where suspects offer innocent state-of-mind explanations for trespassing and other apparent

criminal behavior. As discussed, the existing precedent in the District of Columbia addressing these circumstances supported, not undermined, probable cause. And four judges of the District of Columbia Circuit, considering the facts of this particular case, thought that there *was* probable cause. (Pet. App. 122a, 138a.) An officer cannot be deemed "plainly incompetent" for having shared their view. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (recognizing that eight court of appeals judges agreed with the government official); *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

If even needed, a review of case law beyond the District of Columbia further shows no "obvious" constitutional violation. The most analogous cases have found probable cause to arrest for trespassing despite the suspect's innocent explanation. For example, the Second Circuit held that probable cause was "easily met" even though the suspect claimed her entry was privileged because "she had legal title to the residence," she "was removing only her own property," and her "attorney told her she could do so." *Finigan*, 574 F.3d at 60-63. Likewise, the Third Circuit upheld a trespassing arrest even though the officer "may have made a mistake" in disbelieving the suspect's reasonable explanation; as the court explained, probable cause does not require that officers' "determinations of credibility were, in retrospect, accurate." *Wright v. City of Phila.*, 409 F.3d 595, 603 (3d Cir. 2005). Officers could also have drawn support from the abundant case law giving them wide latitude to discount innocent state-of-mind explanations (*see supra* at 27-33), as well as from this Court's decisions, including *Pringle*.

3. Officers Parker and Campanale's reasonable reliance on their supervisor's directive further supports qualified immunity. When Sergeant Suber ordered the arrests, these two officers already knew of facts at least arguably supporting a charge of unlawful entry. (*See supra* at 44.) They also knew that Sergeant Suber and other officers on the scene had been gathering additional facts as part of a thorough investigation. (J.A. 75, 93-95, 100, 131-32.) Where an on-scene supervisor finds probable cause to arrest based on the collective information available to the police, it is generally reasonable for subordinate officers to comply with this determination. Nothing suggested otherwise to the two defendant officers here. This is another factor favoring qualified immunity. *See Messerschmidt v. Millender*, 565 U.S. 535, 554-55 (2012) (explaining that the pre-approval of superiors "is certainly pertinent in assessing whether [the officers] could have held a reasonable belief that the warrant was supported by probable cause"); *Liu v. Phillips*, 234 F.3d 55, 57 (1st Cir. 2000) (holding that an officer "may reasonably rely on a fellow officer or agent who does (or by position should) know the substantive law and the facts and who (based on that knowledge) asserts that an offense has been committed").

* * *

As Judge Kavanaugh recognized, the court of appeals' decision "did what the Supreme Court has repeatedly told [the lower courts] not to do: [it] created a new rule and then applied that new rule retroactively against the police officers." (Pet. App. 136a.) It is unfair to impose an award of over $1 million on the officers simply because they did not—and could not—anticipate the court of appeals' decision here. That

decision will also have a broad chilling effect on law enforcement officers when making on-the-scene credibility judgments, adversely affecting their everyday ability to do their jobs and protect the public. Given the unfairness to the officers here and "the importance of qualified immunity 'to society as a whole,'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015), the Court should correct the improper imposition of liability in this case.

CONCLUSION

The Court should reverse the judgment below and direct the entry of summary judgment for the defendants or, alternatively, further proceedings.

Respectfully submitted,

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May 2017